IN THE

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERM, 1896.

No. 273.

BENTON TURNER, PLAINTIFF IN ERROR,

against

THE PEOPLE OF THE STATE OF NEW YORK,
DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

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Brief of Attorney-General, State of New York, on behalf of Defendants in error, the People of the State of New York.

STATEMENT.

This case is brought into the Supreme Court of the United States for the purpose of reviewing the record, evidence and proceedings in pursuance of which the People of the State of New York obtained judgment against the plaintiff in error for the possession of a quantity of logs cut by him upon the lands of the People of the State (pp. 1, 2, 13, 14, 60, 61, 62), and involves the title to

7,500 acres in the Forest Preserve. The plaintiff in error disputes the title of the defendants in error to what is known and described as the southeast quarter of Township 24, Great Tract 1, Macomb's Purchase, Franklin county, New York (pp. 7, 8, 9, 17), and seeks to review upon this appeal the validity of certain statutes of the State of New York regulating the sale of nonresident lands for the nonpayment of taxes, and limiting the time for commencing actions or taking proceedings to vacate tax sales and conveyances for irregularities, or to recover possession of such lands. The land in dispute is the Forest Preserve of the State, and it is made a part of the duties of the Board of Fisheries, Game and Forests of said State to maintain and protect the same, and to promote as far as practicable the further growth of the forest therein. (Chap. 31, General Laws, Article XII, Banks & Brothers' 9th ed. New York Rev. Stat. pp. 917, 918.) The Forest Commission created by chapter 283, Laws 1885, is a continuous body, the present commission succeeding to the duties and authority of the old.

People ex rel. Forest Commission v. Campbell, 152 N. Y. 51.

The act creating the Forest Commission placed the State, through said commission, in actual possession, through the Comptroller's purchase and deed.

People ex rel. Forest Commission v. Campbell, 152 N. Y. 51.
People v. Turner, 145 N. Y. 459.

The Constitution of the State also provides that the lands of the State constituting the Forest Preserve shall be forever kept as wild forest lands, and shall not be

leased, sold or exchanged, or taken by any corporation, and that the timber thereon shall not be sold, removed or destroyed.

Article VII, § 7.

The title of the defendants in error to this particular parcel of land has been twice declared by the courts of the State.

People v. Turner, 117 N. Y. 227.
People v. Turner, 145 N. Y. 459.

The particular complaint of the plaintiff in error is that chapter 448, Laws of 1885, of New York, is in contravention of the first section of the Fourteenth Amendment of the Federal Constitution in that it deprives persons of property without due process of law.

Chapter 427 of the Laws of 1855, as amended, provides for the collection of taxes upon lands of nonresidents and for the sale of such lands for unpaid taxes. The numerous provisions of this chapter relating to the duties of assessors, collectors, county treasurers, supervisors, the right of redemption and cancellation and the general method of collecting unpaid taxes need not be enumerated. Section 65 of said chapter 427, Laws of 1855, was amended by chapter 448, Laws of 1885, so as to read as follows:

"Such conveyances shall be executed by the Comp-
"troller, under his hand and seal, and the execution thereof
"shall be witnessed by the Treasurer or Deputy Comp-
"troller, and all such conveyances that have heretofore
"been executed by the Comptroller, and all conveyances of
"the same lands by his grantee or grantees therein named,
"after having been recorded for two years in the office of
"the clerk of the county in which the lands conveyed

"thereby are located, and all outstanding certificates of a "tax sale heretofore held by the Comptroller that shall "have remained in force for two years after the last day "allowed by law to redeem from such sale shall, six months "after this act takes effect, be conclusive evidence that the "sale and all proceedings prior thereto, from and including "the assessment of the land, and all notices required by "law to be given previous to the expiration of the two "years allowed by law to redeem, *were regular and were* "*regularly given*, published and served according to the "provisions of this act, and all laws directing or requiring "the same, or in any manner relating thereto, and all other "conveyances or certificates heretofore or hereafter exe- "cuted or issued by the Comptroller, shall be presumptive "evidence of the *regularity* of all the said proceedings and "matters hereinbefore recited, and shall be conclusive evi- "dence thereof from and after the expiration of two years "from the date of recording such other conveyances, or of "four years from and after the date of issuing such other "certificates. But all such conveyances and certificates, "and the taxes and tax sales on which they are based, "shall be subject to cancellation, as now provided by law, "on a direct application to the Comptroller or an action "brought before a competent court therefor, by reason of "the legal payment of such taxes, or by reason of the "levying of such taxes by a town or ward, having no legal "right to assess the land on which they are laid."

The provisions of the amendment were made applicable to various counties, including Franklin county, where the lands involved in this controversy are located. The act further provides that it shall not affect *any action, pro-*

ceeding or application pending at the time of its passage; nor *any action that shall be begun, proceeding taken, or application duly made within six months thereafter for the purpose of vacating any tax sales or any conveyance or certificate of sale made thereunder.* This and similar statutes have been held by the courts of New York, as well as other States, and the United States courts, to be in no way in contravention of the Federal Constitution, and also held effective to limit the time within which actions shall be commenced, based upon technical omissions and irregularities not jurisdictional in their nature.

Sprecker v. Wakely, 11 Wis. 432.
Geekie v. Kirby Carpenter Co., 106 U. S. 379, 384.
Townsen v. Wilson, 9 Penn. 270.
Bronson v. St. Croix Lumber Co., 44 Minn. 251.
Williams v. Supervisors of Albany, 122 U. S. 163.
Coulter v. Stafford, 48 Fed Rep. 266.
L. & R. Imp. Co. v. Bardon, 45 Fed. Rep. 706, 711.
Ensign v. Barse, 107 N. Y. 329.
Ostrander v. Darling, 127 N. Y. 70.
People v. Turner, 117 N. Y. 227.
People v. Turner, 145 N. Y. 451.
Allen v. Armstrong, 16 Iowa, 508.
Smith v. Cleveland, 17 Wis. 563, 571.
Freeman v. Thayer, 33 Maine, 83.
Raley v. Guinn, 76 Mo. 270.
Pillow v. Roberts, 13 How. 472.

The facts connected with the title of the defendants in error, the People of the State of New York, to the lands in controversy, and the various attempts of the plaintiff in error, Benton Turner, to defeat the same may be summarized as follows:

The premises were sold by the Comptroller of the State of New York for unpaid taxes of the years 1866, 1867,

1868, 1869 and 1870. The sale was held October 12, 1877. At the sale, the premises were bid in by the Comptroller in behalf of the defendants in error. The two years allowed for redemption expired October 12, 1879. The premises were deeded to said People of the State, June 9, 1881; the deed was recorded June 8, 1882 (p. 10).

Said Turner, without any claim or color of title to the premises, cut and carried away trees from the same from September 1, 1885, to September 1, 1886. Suit was commenced against him by the People December 29, 1886, to recover penalties for said illegal acts.

Cases Court of Appeals, vol. 1248.
People v. Turner, 49 Hun, 466.

The premises at the time of the levy of the taxes for the years 1866 to 1870, inclusive, were owned by Samuel W. Barnard and F. J. Barnard, who sold to one Norton, November 25, 1872. Six of Norton's heirs deeded to one John B. Riley, December 16, 1874. Mr. Turner, having been defeated in this action, while the said People, through the Forest Commission, were both constructively and actually in possession under said deed, procured a conveyance from said John B. Riley, dated December 27, 1886, over nine years after the conveyance to the People, and also, upon June 18, 1887, bought the premises at a sheriff's sale, upon a judgment obtained against a former owner of the property ten years before (p. 10). In the meantime, from September 1, 1886, to March 25, 1887, he continued to cut timber from the lands in question, on account of which the suit now under review was brought (p. 7).

People v. Turner, 145 N. Y. 451.

As will hereafter more fully appear, neither the owner nor any of his representatives ever made any complaint concerning the regularity of these taxes, or the proceedings thereafter taken in pursuance of which the property was sold and conveyed to the defendants in error, and no taxes were paid for a long period of time.

The owner, if he desired and felt himself aggrieved (Laws of 1851, chap. 176, § 5), might have appeared before the board of supervisors of Franklin county, at their annual meeting, for the purpose of having reviewed any assessments upon the property in question. He also had two full years to redeem after the sale of the property. (Laws 1855, chap. 427, § 50.)

Although the property was sold October 12, 1877, they had until December 9, 1885, to bring suit for the purpose of vacating the tax sale, or any conveyance or certificate of sale made thereunder. (Chap 448, Laws 1885, § 2.)

He could also bring ejectment against the Comptroller or Forest Commission of the State (Laws 1885, chap. 283, § 11; Laws 1885, chap. 453, § 4), or retain possession and defend his title. (People ex rel. Millard v. Roberts, 151 N. Y. 540.) He could sue to remove a cloud from the title.

These rights and remedies will be more fully discussed in the course of the argument. The owner did not avail himself of any of these statutory provisions enacted for his benefit, but the plaintiff in error seeks to defeat the title of the defendants in error upon the ground of certain irregularities, alleging that the owner has been deprived of his property without due process of law.

The Purpose, Scope and Intent of the Statute.

The counsel for the plaintiff in error declares that this statute "was intended to *validate all tax titles* existing in certain counties of the State," and that "it provided in substance that all deeds theretofore executed by the Comptroller upon any tax sale which had been on record for two years, should, after the lapse of six months from the passage of the act, *be conclusive evidence of their validity.*"

It is respectfully submitted that such a declaration is based upon a misinterpretation of the law, and that the statute under consideration makes no such provision. It neither assumes to validate all tax titles, nor does it make any deeds or conveyances conclusive evidence of their own validity. It does, however, provide that actions brought to set aside tax sales and conveyances, to recover possession of land, or intended to test the validity of tax sales, shall be brought within a specified time, where the only ground of complaint is that the proceedings were technically irregular, and that the statutes were not strictly pursued in every particular in imposing the tax and subsequent thereto. Neither the courts, nor the Legislature, nor the People of the State of New York, have attempted, as the counsel suggests, "to acquire the land of citizens for public use, in evasion of the constitutional requirement of just compensation."

As will be hereafter seen, the tax laws of the State of New York give ample opportunity to every property owner to pay his taxes, to redeem after his property has been sold, but limits the time within which actions can be brought to vacate tax sales and conveyances, to

assert title or to regain possession of the land when such actions are based upon technical irregularities. The statute does not affect jurisdictional defects, neither does it make a deed conclusive evidence of its own validity. In cases where the owner, or party interested, desires to avail himself of the benefit of an action to set aside a sale or conveyance, or to attack the title to land sold for the nonpayment of taxes, alleging as a cause of action mere irregularity in the proceedings of the taxing officers, he must commence suit within two years after recording the conveyance, which, in all cases, will give him at least six years after the taxes were assessed, and at least four years after the land was sold. The Comptroller is authorized to proceed to advertise and sell, when the tax remains unpaid for two years from the 1st day of May following the year in which the same is assessed. (See Appendix, p. 42, § 33.) The deed may be executed at the expiration of two years after the issue of the certificate of sale. (Appendix, p. 51, § 63.) The deed does not become evidence for any purpose until it has been recorded for two years. (See chap. 448, Laws 1885.) Of course, as a matter of practice, the times for selling lands by the Comptroller, issuing certificates and recording deeds, are much greater; we are giving here simply the minimum periods.

As to certificates of tax sales that had been outstanding for four years, or conveyances that had been recorded for two years at the time the law went into effect, the statute requires that all actions intended to attack the regularity of the sales and proceedings should be commenced within six months after the law became effective. The land in controversy in this case was sold October 12,

1877, and all parties interested therein had until December 9, 1885, to attack the regularity of the proceedings. It is to be remembered that the limitation does not apply to any case where the taxes have been paid, where there has been an assessment made by a wrong town or ward, where resident lands have been assessed as nonresident lands, where there has been an improper levy, or where there has been any other jurisdictional defect in the proceedings. The statute provides for cases where parties interested in lands have waited or desired to wait until lands sold for taxes have been improved by the purchaser or greatly enhanced in value, and who then, after a long period of years has elapsed, attempt to vacate tax sales and regain the property sold, on account of some technical irregularity in the proceedings. The statute, by limiting the time within which actions actions shall be commenced, protects, to some extent, purchasers at tax sales, including the State, from individuals who make a practice of buying up suits against the holders of lands purchased and held in good faith, and from owners who, after refusing or neglecting to pay their taxes for many years, desire to take advantage of technical defects in the proceedings.

General Provisions of the Tax Law.

The tax laws of the State of New York are liberal in their provisions. Many of their details are found in the appendix furnished by the counsel for the plaintiff in error. Generally speaking, the statute provides as follows (reference will be made to the statutes as they existed at the time chap. 448, Laws of 1885 went into effect):

1. The assessors must complete the assessment-roll on or before the 1st day of August, and post notices thereof, advertising that the rolls have been completed and filed with one of their number, at a specified place, where the same may be seen and examined until the third Tuesday of August, and that on that day they will meet to review their assessment. On the application of any person feeling himself aggrieved, they are required to meet at the time and place specified, and to hear and examine the complaints. (Appendix, p. 11, §§ 19 and 20.)

If the assessors neglect to meet, any person aggrieved by the assessment of the assessors may appeal to the board of supervisors at their next meeting, who shall have power to review and correct the assessment. (Laws of 1851, chap. 176, § 5.)

2. The county treasurer, when he receives from the collector an account of unpaid taxes assessed on lands of nonresidents, must before the 1st day of April next ensuing transmit the account to the Comptroller, who, if the tax remains unpaid for two years from the 1st day of May following the year in which the same was assessed, shall proceed to advertise and sell the land. (Laws of 1855, chap. 427, §§ 4 and 33; Appendix, pp. 34 and 42.) The sale must be advertised for ten weeks in newspapers of the county, in addition to publication in the State paper, also for twelve weeks successively in all the newspapers in the State designated for printing Session Laws. (Laws of 1855, chap. 427, §§ 34 and 41; Appendix, pp. 43–45.)

3. The owner or occupant, or any person interested in the land, may redeem the same at any time within two

years after the last day of the sale. The Comptroller must, at least six months before the expiration of the two years, cause notices to be published at least six weeks successively, and completed at least eighteen weeks before the expiration of the two years allowed for redemption, which notices are to be published in each county of the State, specifying each parcel of land unredeemed, the amount to be paid, and that the land will be conveyed to the purchaser unless redeemed by a certain day. If no person redeems the land at the expiration of the time specified, the Comptroller is authorized to convey the same to the purchaser, which vests in the grantee "an absolute estate in fee simple." If there is any person in occupancy of the land, or any part thereof, at the time of the expiration of the two years, the grantee, within two years of the expiration of the time to redeem, must serve a written notice on the occupant allowing the occupant, or any other interested person, six months additional time to redeem. (Laws of 1855, chap. 427, §§ 50, 61, 63, 68, 70; Appendix, pp. 47, 50, 51, 53, 54, 55.)

4. In case there has been a jurisdictional defect (either of omission or commission) in the proceedings of any of the officers, from the assessor to the Comptroller, the proceedings are void, and no attempt has been made to validate the same. The State, in common with many other States, has from time to time enacted laws providing for the cure of irregularities, and making the deed of conveyance, after certain periods of time, evidence that the sale and the prior proceedings were regular.

In cases where the purchasers at tax sales are individuals, the regularity of the proceedings and the validity of the tax title may be tested by a direct action. This is

true to the same extent where the State is a purchaser. This proposition will be discussed more at length later in the brief.

Laws 1885, chap. 448, § 2.
People ex rel. Millard v. Roberts, 151 N. Y. 540.
People ex rel Forest Com. v. Campbell, 152 N. Y. 51.
Saranac Land and Timber Co. v. Roberts, 68 Fed. Rep. 521.
Clark v. Davenport, 95 N. Y. 477.
Hagner v. Hall, 10 App. Div. 581.

POINTS.

I.

The courts of the State of New York in construing the provisions of Chapter 448 of the Laws of 1885, and the provisions of the tax laws of that State, have held that the defects complained of by the plaintiff in error were irregularities and not jurisdictional in their nature, and that construction will be followed by the Federal courts. These defects were plainly technical irregularities.

The plaintiff in error attacks the proceedings by virtue of which the land was sold and conveyed to the State upon two grounds.

1. That the assessors of the town of Harrietstown, Franklin county, wherein the property was situated, in preparing the assessment-roll for the year 1867, subscribed the oath required by law, as to the correctness of

said roll on the 10th day of August of that year, instead of upon the third Tuesday of August.

2. That in the year 1870, the assessors of said town, after having prepared their assessment-roll for that year, did not meet on the third Tuesday of August, or thereafter, for the purpose of reviewing their assessment for that year.

A. Referring to the first complaint of the plaintiff in error that the oath relating to the correctness of the roll was verified upon the 10th of August.

In considering this alleged defect, the Court of Appeals, in the case of The People v. Turner, 145 N. Y. 456, says: "Referring now to the points taken by the appellant in objection to the right of the People to maintain their action against him, he claims that the tax sale of 1877 was illegal and void; for the reasons that the tax for the year 1867 was based on an assessment-roll verified before the third Tuesday of August, and, as to the tax for the year 1870, that the assessors had omitted to meet on the third Tuesday of August, as required by law. He further claims that these were jurisdictional defects which the act of 1885 could not cure, and he also asserts the unconstitutionality of the act. As to the first objection, relating to the proceedings of the tax assessors, I would observe, in the first place, that they were not jurisdictional defects, in any proper sense. They were irregularities in the proceedings for the assessment of the tax."

A similar question was considered in the case of Ensign v. Barse, 107 N. Y. 339, in which the court discusses numerous objections raised concerning the validity of the

tax sale, among others, the date of the verification of the assessors' certificate. With reference to this the court says: "The same answer awaits the fourth objection, which is founded upon the date of the assessors' certificate, indicating that it was made August 4, 1849. We are not quite sure that we understand correctly the appellants' brief upon this point. They seem to concede, that, as the law then stood, though it is different now, the roll could have legally been verified as early as the 1st day of August, and should have been verified 'forthwith.' That assumes that the verification was too late. But they also cite authority to show that it was too soon. This defect, if it was one, was also in the nature of an irregularity, which we need not consider further."

A similar question was considered in the case of Parish v. Golden, 35 N. Y. 462, relating to a defect in the verification by the assessors. The court says, at page 467: "There is nothing in the nature of the verification showing that it may not be made after the delivery of the assessment roll to the supervisors, as well as before, and I am of the opinion that the duty of verifying the assessment is to be regarded as directory, rather than jurisdictional."

It is to be observed that the first two cases above quoted from arise in connection with the validating acts of 1885 and 1882. It is also to be observed that none of the cases cited by the counsel for the plaintiff in error consider the effect of a curative statute.

While it may be true that an action brought within the time limited by the statute, to set aside or vacate the tax sale, on account of defective verification, would be sus-

tained, the lapse of time prescribed by the statute would bar the owner from setting up such irregularity, as against the tax deed. In other words, the party desiring to avail himself of the irregularity must commence his action before the statute of limitations has run.

In the case of Terrell v. Wheeler, 123 N. Y. 79, the court says: "After our decision in the case of Breevort v. The City of Brooklyn, 89 N. Y. 128, holding that certain tax impositions were void on account of defective verifications of the assessment-rolls by the assessors, the Legislature passed the act (Chap 363, Laws 1882) confirming the taxes theretofore imposed, and thereafter no tax in Kings county, assessed before the passage of that act, could be assailed on account of any irregularity. The taxes were not invalid for want of jurisdiction to impose them, nor because any constitutional right of the taxpayer had been disregarded or violated, but they were invalid because the law had not been strictly pursued in their imposition, and hence there was legislative competency to cure the defects and to confirm them. (Clementi v. Jackson, 92 N. Y. 591; Ensign v. Barse, 107 id. 329; Williams v. The City of Albany, 122 U. S. 154.)"

The premises described in the pleadings were sold by the Comptroller of the State of New York for unpaid taxes for the years 1866, 1867, 1868, 1869 and 1870, the amount remaining unpaid for taxes, including interest and expenses, being the sum of $1,266.46. The premises were bid in by the Comptroller on behalf of the People of the State, and conveyed by him to them by deed dated June 9, 1881, which was recorded in Franklin county on the 8th day of June, 1892. (Fol. 28.) The Comptroller,

in making the sale, bidding in the property on behalf of the People of the State, in executing and recording the deed, followed the statutes of the State in every particular. (Laws 1855, chap. 427, §§ 66, 67, 68, 69, 70.) It is to be remembered that the plaintiff in error, with knowledge of all the facts, took a deed of this land December 27, 1886, nine years after the sale thereof to the State, apparently without consideration, and after suit had been commenced against him, and thereafter purchased the property upon a judgment which had been rendered ten years before, and secured a deed of the land which had been purchased by the State ten years after the State's title had been perfected. (Case, p. 10; 49 Hun, 466; 117 N. Y. 227; 145 id. 451.)

In other words, the plaintiff in error bought from a third person land the title to which had been in the State for many years, for the express purpose of litigating with the State its title to this particular property.

While it may be argued with considerable force that the copies of the assessment-roll offered in evidence were not sufficient to rebut the presumption that the officers discharged their duties in the precise form and manner prescribed by the statutes (Chamberlain v. Taylor, 36 Hun, 33; People ex rel. Wright v. Chapin, 38 id. 272; Wood v. Knapp, 100 N. Y. 112), it is confidently urged that, conceding that the oath was taken upon the 10th of August, instead of on or after the third Tuesday of August, this did not constitute a jurisdictional defect. It is not claimed that any injury was thereby sustained by the owner, and it would appear that the plaintiff in error, under the circumstances set forth in this case, can-

not urge that "The State is seeking, not to enforce collection of its revenues, but to acquire the land of its citizens for public use, in evasion of the constitutional requirement of just compensation."

The statute provides: "The assessors shall complete the assessment-rolls on or before the first day of August in every year, and shall make out one fair copy thereof, to be left with one of their number. They shall forthwith cause notices thereof to be left with one of their number; they shall forthwith cause notices thereof to be put up at three or more public places in their town or ward." (§ 19, Appendix, p. 11.)

"Section 20. Such notices shall set forth that the "assessors have completed their assessment-roll, and that "a copy thereof is left with one of their number at a "place to be specified therein, where the same may be "seen and examined by any person interested, until the "third Tuesday of August; and that on that day the "assessors will meet at a time and place also to be speci- "fied in such notice, to review their assessments. On the "application of any person conceiving himself aggrieved, it "shall be the duty of the said assessors on such day to "meet at the time and place specified, and hear and "examine all complaints in relation to such assessments "that may be brought before them; and they are hereby "empowered, and it shall be their duty, to adjourn from "time to time, as may be necessary, to hear and determine, "in accordance with the rule prescribed by section 15 of "said title 2, such complaints; but in the several cities of "this State, the notices, required by this section, may con- "form to the requirements of the respective laws regu-

"lating the time, place and manner for revising the "assessments in said cities, in all cases where a different "time, place, and manner is prescribed by said laws from "that mentioned in this act." (Appendix, p. 11.)

It would appear to be a very plain proposition that the Court of Appeals was correct in holding that the fact of the assessors taking the oath upon the 10th day of August, did not constitute a jurisdictional defect, or such an omission that it could not be cured by a subsequent statute. We suppose it will be conceded that, "if the thing wanted or omitted, which constitutes the defect, is something, the necessity for which the Legislature might have dispensed with by a prior statute, or if something has been done or done in a particular way which the Legislature might have made immaterial, the omission or irregular act may be cured by a subsequent statute."

The earlier statutes of the State relating to the general duties of the assessors were similar to and framed upon the same general plan as the present statutes relating to that subject.

Chapter 72 of the Laws of 1799 provided for the completion of an assessment-roll by the assessors and the delivery of the same to commissioners on or before the first Tuesday of July and for leaving a copy with one of the assessors and posting notices in two or more public places in the city, ward or town, setting forth that the assessment had been completed and that a copy thereof had been left with one of the assessors, naming him and his place of business, where the same could be seen and examined by any of the inhabitants during ten days; and

further provided that, at the expiration of said time, the assessors should meet in a place specified, to review the assessment on the application of any person conceiving himself aggrieved, and contained various other provisions analogous to the present statute. But we do not find any provision requiring any certificate or oath upon the part of the assessors.

Later on (Revised Statutes 1827, chap. 13, § 26) the statute required a certificate upon the part of the assessors, but no oath.

At a later date, by chapter 176 of the Laws of 1851 (§ 18) a provision was inserted requiring the assessors, upon the completion of the roll, to take oath to the correctness of the same.

It will thus be seen not only that this requirement might have been dispensed with, but that it actually was dispensed with until the date last above mentioned.

As a matter of fact, it appears that notices were actually put up, and one of the assessors appeared at the proper place upon grievance day in the year 1867. *He testifies as follows:* "*No one appeared on the day that I met to hear* "*complaints to the assessment-roll of* 1867; *no grievance* "*was made known to me as assessor: notices were put up.*" (P. 32.)

B. Neither was the neglect of the assessors to meet upon the third Tuesday of August, 1870, for the purpose of reviewing their assessments a jurisdictional omission. The property owners were not thereby deprived of their grievance day. Section 5 of chapter 176, Laws of 1851, makes provision for this very contingency:

Sec. 5. "If the assessors shall willfully neglect to hold "the meeting specified in the last preceding section, each "assessor so neglecting shall be liable to a penalty of "twenty dollars, to be sued for and recovered before any "court having jurisdiction thereof, by the supervisor of "the town for the use of the poor of the same town; "*and, in case of such neglect to meet for review, any per-* "*son aggrieved by the assessment of the assessors may* "*appeal to the board of supervisors, at their next meeting,* "*who shall have power to review and correct such* "*assessment.*"

The courts have held that it is enough if the law provides for a board of revision to hear complaints and prescribes the time and place for hearing such complaints. Thus it was held in Palmer v. McMahon, 133 U. S. 606:

"But it is argued that chapter 230 of the Laws of New "York of 1843 is unconstitutional, as depriving the plain- "tiff in error of liberty and property without due pro- "cess of law, and of the equal protection of the laws, in "violation of the Fourteenth Amendment to the Consti- "tution of the United States. That amendment provides "that no State 'shall make or enforce any law which "shall abridge the privileges or immunities of citizens of "the United States; nor shall any State deprive any per- "son of life, liberty, or property without due process of "law, nor deny to any person within its jurisdiction the "equal protection of the laws.' It is insisted that Palmer "had no notice and no opportunity to be heard or to con- "front or cross-examine the witnesses for the taxing "authorities or to subpœna witnesses in his own behalf, "and had not otherwise the protection afforded in a judi-

"cial trial upon the merits. The phrase 'due process of "law' does not necessarily mean a judicial proceeding. "'The nation from whom we inherit the phrase 'due "process of law,' said the court, speaking by Mr. Justice "Miller, 'has never relied upon the courts of justice for "the collection of her taxes, though she passed through "a successful revolution in resistance to unlawful "taxation (McMillen v. Anderson, 95 U. S. 37, 41).'

"The power to tax belongs exclusively to the legisla- "tive branch of the government, and when the law pro- "vides for a mode of confirming or contesting the charge "imposed, with such notice to the person as is appro- "priate to the nature of the case, the assessment can not "be said to deprive the owner of his property without "due process of law. (Spencer v. Merchant, 125 U. S. "345; Walston v. Nevin, 128 id. 578.) The imposi- "tion of taxes is in its nature administrative and not "judicial, but assessors exercise *quasi* judicial powers in "arriving at the value, and opportunity to be heard "should be and is given under all just systems of taxation "according to value. It is enough, however, if the law "provides for a board of revision authorized to hear com- "plaints respecting the justice of the assessment, and "prescribes the time during which and the place where "such complaints may be made (Hager v. Reclamation "District, 111 U. S. 701, 710)."

In the case of Spencer v. Merchant, 125 U. S. 345, the court held:

"If the Legislature of the State, in the exercise of its "power of taxation, directs the expense of laying out, "grading or repairing a street to be assessed upon the

"owners of lands benefited thereby; and determines the "whole amount of the tax, and what lands, which might "be so benefited, are in fact benefited; and provides for "notice to and hearing of each owner, at some stage of "the proceedings, upon the question what proportion of "the tax shall be assessed upon his land; there is no "taking of his property without due process of law, in "violation of the Fourteenth Amendment to the Consti- "tution of the United States."

See also Stuart v. Palmer, 74 N. Y. 183.
Matter of Common Council, 126 N. Y. 163.

In People v. Turner, 117 N. Y. 237, Judge Ruger said: "A manifest difference exists between the modes of "making assessments for local improvements and those "providing for annual taxation, and much reason exists "why a more formal notice should be given in one case "than the other. In one case they are special, transitory "and occasional, and in the other regular, fixed and of "annual occurrence, known to all people. In one case "they become public only when proceedings are insti- "tuted, and may escape the notice of the landowners. "In the other they occur every year and are as constant "in their recurrence as the changes of the seasons. Con- "ceding, therefore, the right of the taxpayers to this "opportunity, we think an examination of the statute "under which this tax was levied shows that he was not "deprived of such notice and opportunity to be heard as "the nature of the case required. The provisions of the "general statutes require that assessment-rolls in each "year shall be completed on or before the 1st day of

"August, and notices posted in the town that a copy "thereof has been made and left with one of the assessors, "where any person interested can see and examine the "same until the third Tuesday of August thereafter, and "that on that day the assessors will meet at a time and "place specified in such notice to review their assess "ments. (2 R. S., 7th ed., 992, 993.) The notice required "by this act, it will be observed, is not personal, or of an "absolute character, but is constructive, and the provision "for a hearing of the taxpayers by the assessors is of a "most informal and indefinite character. It doubtless "gives the taxpayer a right to appear before the assessors "at the time stated, and endeavor to persuade them to "modify or abate his assessment. He may attempt to "swear off his assessment for personal property, but "beyond this a hearing does not seem to give him "any legal rights, or a denial of such hearing "inflict any absolute legal damage. Section 5, chapter "176 of the Laws of 1851, provides that in case of the "neglect of the assessors to meet for review, as required "by the statute, any person aggrieved by an assessment "may appeal to the board of supervisors at their next "annual meeting, who shall have power to review and "correct such assessment. The consequences of an "omission by the assessors to hold the meeting are thus "expressly declared, and would seem to deprive such "omission of any other effect than that given to it by "this statute. *Ample opportunity is thereby given the "taxpayer, if he feels aggrieved in respect to assessments "of his property, to be heard before the board of super- "visors, who are vested with full power to afford all and*

" *any relief which was possessed by the assessors.* The " taxpayer must be presumed to have knowledge of the " provisions of public statutes; and as the time and place " for the meetings of the boards of supervisors are fixed " by statute and occur at stated periods, we must pre- " sume that the Legislature intended such notice of the " time and place for the hearing of dissatisfied taxpayers " to be adequate notice of the opportunity to be heard.

" As the primary object of the constitutional provision " is to enable the property owner to be heard by some " officer or tribunal, in respect to the taxing of his prop- " erty, having power to relieve him before he can be " deprived of it, he can not justly claim that he has been " unlawfully assessed and taxed if such opportunity has " been afforded him and he has negligently omitted to " avail himself of it. It must be assumed that the tax- " payers know the law of the State in respect to the time " and method of assessing property and levying taxes; " and if they are presumed to know the provisions for " the review of assessments, they must be equally pre- " sumed to know the remedy given by the law for an " omission by the assessors to hold the meeting for such " review.

" We are, therefore, of the opinion that the opportunity " afforded the taxpayer to appear before the board of " supervisors and challenge the legality and fairness of " his assessment was a satisfaction of his rights in respect " to a hearing on the subject. It would have been com- " petent for the Legislature, while authorizing the imposi- " tion of taxes, to have omitted altogether the provisions " requiring notice and a meeting by the assessors to

" review assessments, and to have provided only for a " hearing before the supervisors in the first instance. " Having full authority over the subject, it could lawfully " provide for the way and manner of hearing the tax- " payer, and, in default of a hearing as provided, it could " declare the consequences of such default and provide " for a hearing in some equivalent mode. So long as the " taxpayer is given the equivalent therefor the Legisla- " ture has done all that is required of it under any view " of the taxpayer's constitutional rights. (Spencer v. " Merchant, 100 N. Y. 585.) It was held in the Matter " of De Peyster, 80 N. Y. 565, that an assessment for the " expenses of building a sewer is not invalid because of " omission to give to the owners of lots assessed a per- " sonal notice that an assessment is to be imposed. The " Legislature may prescribe what the notice shall be, and " when provision has been made for notice by publica- " tion before the final confirmation of the assessment, and " an opportunity afforded to make objections within a " time specified, and this has been complied with, no " constitutional right of the taxpayer has been violated " by such proceeding." *It, however, appears that no one appeared upon grievance day to make any complaint.* (P. 32.)

We understand that as a general rule the Supreme Court of the United States, as well as all the Federal courts, will accept the construction of a State court in passing upon the meaning and application of a statute of the State. Thus it was said by Chief Justice Fuller, in Palmer v. McMahon, 133 U. S. 665: " We are bound by the decision of the Court of Appeals of the State of New

York adversely to the plaintiff in error, as to failure to comply with the State statute in relation to method of procedure, form of assessment, oath of assessors," etc.

Amy v. Dubuque, 98 U. S. 470.
Lamborn v. County Com., 97 U. S. 181.
Harpenday v. The Dutch Church, 16 Peters, 455.
Green v. Lessee of Neal, 6 Peters, 291.
Gardner v. Collins, 2 Peters, 58.
De Wolf v. Rolaud, 1 Peters, 476.
Cathcart v. Robinson, 5 Peters, 263.
Bergman v. Bly, 66 Fed. Rep. 40.
Sandford v. Poe, 69 Fed. Rep. 546.
Christy v. Pidgeon, 4 Wallace, 196.
Lane County v. Oregon, 7 Wallace, 71.
State Railroad Tax Cases, 92 U. S. 618.
Witherspoon v. Duncan, 4 Wallace, 217.

We have called attention to the alleged defects in the title of the defendants in error as preliminary to a consideration of chapter 448, Laws of 1885. *It is to be noted that neither the owner nor any one interested in the property at the time of the sale has ever questioned the title of the State*, and that this land, apparently, has a record for nonpayment of taxes. The State commenced an action against the plaintiff in error in December, 1886, to recover damages for cutting and carrying away trees from the Forest Preserve, and at that time plaintiff in error appeared in the capacity of a mere trespasser, showing no title, but claiming that by reason of certain alleged omissions of the assessors the Comptroller acquired no jurisdiction to make the sale, and that the State's title was defective. (See People v. Turner, 117 N. Y. 228; same case, 49 Hun, 466.) The same individual, after being defeated upon the trial before the referee and the Supreme Court (see 49 Hun, 466), pur-

chased an adverse title on the 19th day of February, 1889, inviting further litigation with the State and setting up the same defenses which he alleged in the other action. (Fol. 27.) In both cases he has urged the most technical of defenses, which, if available at all, were evidently intended to be for the benefit of the owner of the property, and not for the advantage of a person who was originally a stranger to the transaction, and who many years thereafter bought up or attempted to purchase an adverse title.

II.

Chapter 448 of the Laws of 1885 is valid as a curative statute and as a statute of limitation. Neither does it deprive any person of property without due process of law.

Chapter 448 of the Laws of 1885 was an amendment to section 65 of chapter 427 of the Laws of 1855, known as the General Tax Law of this State, and this amendment had reference to the effect to be given to certificates of tax sales made by the Comptroller and conveyances made by him in pursuance of such sales. It was intended to operate both as a curative statute and as a statute of limitations, requiring that actions commenced to vacate the tax sale or conveyance or to test the regularity of the same by ejectment or otherwise should be instituted within two years after recording the conveyance or four years after the sale, where the action was based upon irregularities and not upon jurisdictional defects. As to certificates of sale outstanding at the time the law went into effect and that had remained in force two years

after the last day allowed for redemption (four years from the date of their issue) the law provides that proceedings taken on actions commenced to vacate the tax sale or conveyance must be instituted within six months of the date of the law. The statute has no application to jurisdictional defects. The substance of such act so far as it is material is as follows:

"Sec. 65. Such conveyances shall be executed by the "Comptroller under his hand and seal, * * * and all "such conveyances that have heretofore been executed by "the Comptroller, and all conveyances of the same lands "by his grantee or grantees therein named, after having "been recorded for two years in the office of the clerk of "the county in which the lands thereby conveyed are "located, and all outstanding certificates of a tax sale "heretofore held by the Comptroller that shall have re-"mained in force for two years after the last day allowed "by law to redeem from such sale, shall, *six months* after "this act takes effect, be conclusive evidence that the sale "and all proceedings prior thereto, from and including the "assessment of the land and all notices required by law to "be given * * * were *regular* and were *regularly* "given, published and served according to the provisions "of this act, and all laws directing or requiring the same, "or in any manner relating thereto, and all other con-"veyances or certificates heretofore or hereafter executed "or issued by the Comptroller, shall be presumptive "evidence of the regularity of all the said proceedings "and matters hereinbefore recited, and shall be conclusive "evidence thereof * * * two years from the date of "recording such other conveyances or four years from "and after the date of issuing such other certificates."

This act, by its terms (§ 2), was made applicable to certain counties of the State of New York, among which was the county of Franklin, the county in which the lands which are the subject of this action are situated. "But "shall not affect any action, proceeding or application "pending at the time of its passage; nor any action that "shall be begun, proceeding taken or application duly "made within six months thereafter, for the purpose of "vacating any tax sale or any conveyance or certificate "of sale made thereunder." The statute, it will be observed, refers to both applications and actions.

It is not claimed that the statute makes a deed or conveyance conclusive evidence of title or a cure of jurisdictional defects. The courts of New York have held directly the reverse, and have decided that this and similar statutes were intended to cure irregularities, and were not intended to and do not cure jurisdictional defects of such a nature that the Legislature could not have dispensed with the statutory requirement, a failure to comply with which constitutes the defect. The statute in terms simply provides for presumptive and conclusive evidence of *regularity* in the proceedings, limiting the time within which actions can be brought or proceedings taken, based upon irregularities in the proceedings. There is no claim made upon the part of the defendants in error or the courts of New York that the statute applies to cases where there has not been obtained jurisdiction of the subject-matter; where the tax has been levied by a town or ward having no legal right to assess the land; where the tax has been paid; where resident lands have been assessed as nonresident lands, where a part of the property in a

district has been assessed at one rate and a part at another; where there has not been a levy; where property in one district has been assessed by assessors in another district. But it is claimed that where each of the officers from the assessors to the Comptroller, has acquired jurisdiction, the Legislature may pass an act limiting the time within which proceedings shall be taken to vacate the tax sale or conveyance, when the action is based upon irregularities upon the part of the taxing officers.

In the case of Ensign v. Barse, 107 N. Y. 338, numerous irregularities were alleged, among them the date of verifying the assessment-roll. The court says:

"So far as these defects were not jurisdictional and "amounted only to irregularities, they were cured by the "act of 1882 (Chap. 287), which provided that where fif- "teen years had elapsed after a conveyance by the Comp- "troller or county treasurer of lands in Chautauqua or "Cattaraugus county belonging to nonresident owners, "and such owners had not entered into actual possession "of the same and made permanent improvements thereon, "the deed or conveyance should be 'conclusive' evidence "that 'the sale and all proceedings prior thereto, from "and including the assessment of the land and all notices "heretofore or hereafter required by law to be given, "previous to the expiration of the time allowed by law "to redeem, were regular and were regularly given, pub- "lished and served according to the provisions of all laws "requiring and directing the same or in any manner "relating thereto.' * * * But it is further assailed "as retrospective in its operation and in violation of sec- "tion 6 of article 1 of the Constitution which provides

"that no person shall be deprived of life, liberty or prop-
"erty without due process of law. The counsel on both
"sides agree as to the legitimate range of a curative stat-
"ute. They agree that a retrospective statute curing
"defects in a legal proceeding where they are in their
"nature irregularities only and do not extend to matters
"of jurisdiction, is not void on constitutional grounds;
"that if the thing wanting or omitted, which constitutes
" the defects is something, the necessity for which the
" Legislature might have dispensed with by prior statutes,
" or if something has been done or done in a particular
" way which the Legislature might have made immate-
" rial, the omission or irregular act may be cured by a
" subsequent statute. We see no reason to disagree with
" the counsel in this general statement of the law, at least
" for present purposes, though it may not be above criti
" cism or beyond exception. The act of 1882 does not
" on its face purport to cure jurisdictional defects. It
" raises a conclusive presumption of regularity, but leaves
" the question of the assessors' jurisdiction and authority
" unaffected. Thus understood, it comes within the rule
" which counsel concede to be correct. It does not make
" the tax deed conclusive evidence of a complete title, but
" leaves open to the owner full right to assail the pro-
" ceedings in any jurisdictional respect."

Again, in the case of Joslin v. Rockwell, 128 N. Y. 338, in which case it was claimed that the nonresident lands were occupied and that the taxes had been paid, Peckham, J., says:

"In Ensign v. Barse, 107 N. Y. 329, the statute pro-
" vided that, under certain circumstances named in the

" act the Comptroller's deed should be 'conclusive evi-
" dence' that 'the sale and all proceedings prior thereto,
" from and including the assessment of the land, and all
" notices heretofore or hereafter required by law to be
" given, previous to the expiration of the time allowed by
" law to redeem, were regular and were regularly given,
" published and served according to the provisions of all
" laws requiring and directing the same, or in any manner
" relating thereto.'

"The plaintiffs here claim title under two deeds from
" the Comptroller to Gerritt Smith, executed by reason
" of sales of the land for nonpayment of taxes. In
" 1885, long subsequent to such sales and conveyances by
" the Comptroller, the Legislature passed the act known
" as chapter 448, of the laws of that year, and it was pro-
" vided therein that after certain times therein stated,
" the deeds of the Comptroller executed upon sales for
" the nonpayment of taxes, should be 'conclusive evi-
" dence' that 'the sale of said lands and all proceedings
" prior thereto, from and including the assessment of
" the land, and all notices required by law to be given
" previous to the expiration of two years allowed by law
" to redeem, were regular and were regularly given, pub-
" lished and served according to the provisions of this
" act, and all laws directing or requiring the same or in
" any manner relating thereto.' The Comptroller's deeds
" under which the plaintiff claims, were executed and
" recorded in due time, so as to come within the purview
" of this act.

" It is evident that, upon the subject of the conclusive
" character of the Comptroller's deed, the act of 1885

" does not differ in any material respect from the act " already quoted, and which was under discussion in the " case of Ensign v. Barse, *supra*. It must, therefore, " receive the same construction which was given the act " in that case. It was there said that the act did not, on " its face, purport to cure jurisdictional defects. Judge " Finch, in the course of his opinion, declared that the " act 'raises a conclusive presumption of regularity, but " leaves the question of the assessors' jurisdiction and " authority unaffected. Thus understood, it comes within " the rule which counsel concede to be correct. It does " not make the tax deed conclusive evidence of a com- " plete title, but leaves open to the owner full right to " assail the proceedings for any jurisdictional defect' " This construction was concurred in by the whole court. " Nothing in the cases of People v. Turner, 117 N. Y. " 227, and Ostrander v. Darling, 127 N. Y. 70, enlarges " the construction to be given the act of 1885."

It may be stated as an indisputable proposition that a departure from the strict letter of a statute can not be said to be a jurisdictional defect, in a constitutional sense, which, had it been directed by statute, would not have rendered the statute unconstitutional, and that a curative statute may validate acts which the Legislature might originally have authorized, and limit the time within which actions to set aside tax sales based upon irregularities shall be commenced.

Thus Cooley, in his Constitutional Limitations, says (pp. 469, 470): "But the healing statute must in all cases " be confined to validating acts which the Legislature " might previously have authorized. It can not make

"good retrospectively acts or contracts which it had and "could have no power to permit or sanction in advance. "There lies before us at this time a volume of statutes of one "of the States, in which are contained acts declaring certain "tax rolls valid and effectual, notwithstanding the fol- "lowing irregularities and imperfections: A failure in the "supervisor to carry out separately, opposite each parcel "of land on the roll, the taxes charged upon such parcel, "as required by law; a failure in the supervisor to sign "the certificate attached to the roll; a failure in the "voters of the township to designate, as required by law, "in a certain vote by which they had assumed the pay- "ment of bounty moneys, whether they should be raised "by tax or loan; corrections made in the roll by the "supervisor after it had been delivered to the collector; "the including by the supervisor of a sum to be raised for "township purposes without the previous vote of the "township, as required by law; adding to the roll a sum "to be raised which could not lawfully be levied by tax- "ation without legislative authority; the failure of the "supervisor to make out the roll within the time required "by law; and the accidental omission of a parcel of land "which should have been embraced by the roll. In each "of these cases, except the last, the act required by law "and which failed to be performed, might by previous "legislation have been dispensed with; and perhaps in "the last case there might be question whether the roll "was rendered invalid by the omission referred to, and if "it was, whether the subsequent acts could legalize it. "But if township officers should assume to do acts under "the power of taxation which could not lawfully be justi-

"fied as an exercise of that power, no subsequent legis-
"lation could make them good. If, for instance, a part
"of the property in a taxing district should be assessed at
"one rate, and a part at another, for a burden resting
"equally upon all, there would be no such apportionment
"as is essential to taxation, and the roll would be beyond
"the reach of curative legislation. And if persons or
"property should be assessed for taxation in a district
"which did not include them, not only would the assess-
"ment be invalid, but a healing statute would be ineffect-
"ual to charge them with the burden. In such a case
"there would be a fatal want of jurisdiction; and even in
"judicial proceedings, if there was originally a failure of
"jurisdiction, no subsequent law can confer it."

It is to be noted that the word "jurisdictional" may be used in a modified sense. In Ensign v. Barse, 107 N. Y. 346, the court says:

"Finally, passing over one or two suggestions that re-
"quire no answer, our attention is called to the case of
"Shattuck v. Bascom, 105 N. Y. 39. We there held a
"defect in the assessor's affidavit fatal to the assessment.
"We did not speak of the defect as jurisdictional, though
"if we had, no collision of authorities would have re-
"sulted. The opinion in the present case is careful not to
"deny a possible fatal result of the defect, although it is
"rather formal than substantial, but for the curative
"effect of the statute of 1882, which had no parallel in
"any form in the facts of the cited case. In the opinion
"then delivered the defect was not deemed jurisdictional
"in any other sense than the modified one of an essential
"condition under the law *as it stood*. Whether it was *so*
"jurisdictional as that the Legislature could not have

"dispensed with it, and, therefore, could not cure its "omission, is a very different inquiry. *A defect may be "in one sense jurisdictional relatively to the authority of "the assessors acting under the existing law, and yet not so "as it respects the power of the Legislature to pass a* "statute curing the defect; it is only by confusing these "two things which the opinion separated, that a seeming "contradiction can be reached."

The learned counsel for the plaintiff in error not only fails to recognize the distinction made by the courts of New York, but apparently seeks to give a force and meaning to the curative statute of 1885, which is not claimed for it by the defendants in error here, which was not intended by the Legislature, and which has not been given it by the courts, which have construed this legislation so clearly that there is no room for misapprehension.

Ensign v. Barse, 107 N. Y. 338.
Joslyn v. Rockwell, 128 N. Y. 388.
People v. Turner, 145 N. Y. 457.

In the latter case the court says:

"Referring now to the points taken by the appellant, in "objection to the right of the People to maintain "their action against him, he claims that the tax sale of "1877 was illegal and void; for the reasons that the tax "for the year 1867 was based on an assessment-roll "verified before the third Tuesday of August and, as to "the tax for the year 1870, that the tax assessors "had omitted to meet on the third Tuesday of August, as "required by law. He further claims that these were "jurisdictional defects, which the act of 1885 could not "cure, and he also asserts the unconstitutionality of the

"act. As to the first objection, relating to the proceed-
"ings of the tax assessors, I would observe, in the first
"place, that they were not jurisdictional defects in any
"proper sense. They were irregularities in the proceed-
"ings for the assessment of the tax. Some confusion of
"thought may be occasioned by the unguarded language
"of Chief Judge Ruger in People v. Turner, 117 N. Y.
"227, who speaks of the irregular proceedings by the
"assessors as jurisdictional defects. But it is very clear that
"he did not intend the full force of that expression and
"that he used those words in the sense in which they
"were used by Judge Finch in Ensign v. Barse, 107 N.
"Y. 329. In the latter case it was held that those
"defects, only, which went to the jurisdiction and
"authority of the assessors were not cured by the act of
"1882. The defect there considered was the defective
"date of the assessors' certificate and that was deemed to
"be in the nature of an irregularity, merely. In Joslyn
"v Rockwell, 128 N. Y. 338, it was held that the act of
"1885, now in question, did not differ, in any material
"respect, from the act of 1882, which was discussed in
"Ensign v. Barse. The defects, which the appellant here
"points out in the proceedings of the tax assessors, are
"not unlike in their effect, to those which were relied
"upon in his former case. There they consisted of the
"alleged omission by the assessors to give notice of a
"review of the assessments in the years referred to, or
"to hold a meeting for such purpose, as required by the
"statute, and in closing and verifying the assessments
"prior to the time provided by law. Those irregularities
"of the assessors were considered by Judge Ruger in

"connection with the effect to be given to the Comp-
"troller's deed, after a certain lapse of time, under the act
"of 1885. It was held that the act, in its principal aspect,
"was one of limitation, and that, as such, it was within
"the constitutional power of the Legislature to enact as
"affecting future cases, and, as well, existing rights."

The Supreme Court of the United States, speaking of chapter 345, Laws of 1883, State of New York, a validating act, says:

"The irregularities in the assessment for the years
"1876, 1877 and 1878, in that no entry of any assessment
"of the shares of the plaintiff and of the stockholders whose
"claims were assigned to him was made on the assess-
"ment roll of those years until after the 1st of Septem-
"ber, and after the time for revising and correcting the
"assessment had passed, and in the defect of the oath
"annexed in its averment as to the estimate of the value
"of real estate, were, in our judgment, cured by the
"validating act of April 30, 1883. The power of taxation
"vested in the Legislature is, with some exceptions,
"limited only by constitutional provisions designed to
"secure equality and uniformity in the assessment. The
"mode in which the property shall be appraised, by whom
"its appraisement shall be made, the time within which
"it shall be done, what certificate of their action shall be
"furnished, and when parties shall be heard for the cor-
"rection of errors, are matters resting in its discretion.
"Where directions upon the subject might originally have
"been dispensed with, or executed at another time,
"irregularities arising from neglect to follow them may
"be remedied by the Legislature, unless its action in this

respect is restrained by constitutional provisions pro "hibiting retrospective legislation."

Williams v. Supervisors of Albany, 122 U. S. 163.

Statutes of the kind under consideration have been repeatedly construed by the courts. The Supreme Court of the United States, in discussing the Wisconsin statute, says: "The statute applies whenever there has "been an actual attempt, however defective in detail, to "carry out a proper exercise of the taxing power. As "against the grantee in the tax deed the statute puts at "rest all objections raised, after the time specified, against "the validity of the tax proceeding, from and including "the assessment of the land to and including the execu- "tion of the deed. If the deed is valid on its face, and "purports to convey the land on a sale for the non- "payment of taxes, it is, during the three years, *prima* "*facie* evidence of the regularity of the tax proceeding, "and, after the statute has run in favor of the grantee, "the deed becomes conclusive to the same extent. The "general authority of the taxing officers and the liability "of the land to taxation having existed, there was no "want of authority to put the taxing power in motion. "That being so, the lapse of time establishes conclusively "the validity of the tax and of the sale, as against the "irregularity in question. There having been jurisdiction "all error was conclusively barred by the statute. This "construction is that held by the Supreme Court of "Wisconsin in regard to this statute, in Oconto County "v. Jerrard, 46 Wis. 317, and Milledge v. Coleman, 47 "id. 184. It is said, and correctly, in the latter case, that

"that is the view which has been uniformly taken of that "statute by that court, and that to adopt a contrary view "would disturb numerous titles. Such construction was, "therefore, always a rule of property in respect to land "in Wisconsin, and is one which this court will follow."

Geekie v. Kirby Carpenter Co, 106 U. S. 384.

In the case of Coulter v. Stafford, 40 Fed. Rep. 266, the court held:

"Code Wash., § 2939, providing that no suit for the "recovery of lands sold for taxes shall be commenced "more than three years after the recording of the tax "deed, is a complete defense to a suit brought after that "time, when the recorded deed is valid upon its face; "and plaintiff can not show that deed is void by reason "of irregularities in the prior proceedings."

In the case of The Land and River Imp. Co. v. Bardon, 45 Fed. Rep. 711, the court said: "The effect of the "statute is to cut off all inquiry into the title or the "regularity of the proceedings on which the deed is "founded, so that defects in those proceedings which "might otherwise avoid the deed can not be made availa- "ble. If a tax has been levied by competent authority, "and has not been paid, a valid record and the running "of the statute shuts out all inquiry into the regularity "of the proceedings, in other respects, and bars the "former owner's rights. The statute, as applicable "to a case like this, has been so often construed "and so long settled that it seems quite needless to "go over the ground at this late day, and I shall con- "tent myself by a brief reference to some of the

"cases which, in my judgment, furnish the rule for "the one at bar: Edgerton v. Bird, 6 Wis. 527; Falkner "v. Dorman, 7 id. 388; Knox v. Cleveland, 13 id. 245; "Parish v. Eager, 15 id. 532; Swain v. Comstock, 18 id. "463; Sprecher v. Wakely, 11 id. 432; Hill v. Kricke, "id. 442; Dean v. Earsley, 15 id. 100; Whitney v. "Marshall, 17 id. 174; Gunnison v. Hoehne, 18 id. 268; "Lawrence v. Kenney, 32 id. 281; Wood v. Meyer, 36 id. "308; Oconto Co. v. Jerrard, 46 id. 317. See, also, Cole- "man v. Lumber Co., 30 Fed. Rep. 317, where the United "States Circuit Court for the eastern district of Wiscon- "sin followed the same rule laid down in the foregoing "cases."

In a recent case (Hagner v. Hall, 10 App. Div. 581, 2d Dep. N. Y. Sup. Ct.) the court comments upon irregularities as distinguished from jurisdictional defects (p. 585):

"In the case before us the owners had ample opportunity for hearing before the board of assessors. If, therefore, the defect in this case was only an irregularity the statute of 1885 was constitutional, and has rendered the taxes valid. I am not inclined to enter into subtle discussion or nice distinction between defects that are irregularities and those that are jurisdictional. In the decided cases are to be found expressions condemning defects in the levying of taxes as jurisdictional, which undoubtedly the Legislature could cure by subsequent laws. As pointed out by Judge Finch, in Ensign v. Barse, *supra*, there are defects which may be deemed jurisdictional under the law as its stands, yet not so jurisdictional that the Legislature may not subsequently cure them. It becomes necessary, therefore, to examine the

character and effect of proceedings for the taxation of lands of resident owners under the general system of the State. If they are proceedings to tax the land itself I should be inclined to admit that the error in the imposition of taxes laid on the plaintiff's land was an irregularity only, or at least not so jurisdictional as to be beyond the reach of subsequent legislation."

In Cooley's Constitutional Limitations (6th ed.), at page 457, the author says:

"The rule applicable to cases of this description is substantially the following: If the thing wanting or which failed to be done, and which constitutes the defect in the proceeding, is something the necessity for which the Legislature might have dispensed with by prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the Legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law."

As already appears, the oath of assessors not only might have been dispensed with, but was actually not required until 1851.

McCreadie v. Saxton, 29 Iowa, 399, is a leading case. It was there held that the Legislature might prescribe the time and manner in which the essential jurisdictional acts of the tax officers should be done.

These essential jurisdictional acts are enumerated to be:

1st. The listing of the property for taxation.

2nd. The assessment or ascertainment of value of the property.

3rd. The levying of the tax.

4th. The warrant for its collection.

5th. The sale for nonpayment of taxes.

These are deemed jurisdictional matters and can not be dispensed with, but the Legislature can prescribe the time or manner in which each shall be done, and in this respect "the discretion of the Legislature is absolute and supreme, and can not be judicially controlled or interfered with. Having the right to prescribe the manner, it may also rightfully provide that a failure to comply with its directions as to the manner shall not defeat the end, or that no person shall question the legality of the manner; or that any subsequent act or fact shall be either *prima facie* or conclusive evidence that the law as to time or manner was complied with."

The counsel has correctly stated that the land under consideration was a wild forest. As will more fully appear in our third point, the State, before the enactment of chapter 448 of the Laws of 1885, was in actual possession of this land in controversy through its Forest Commission and other State officials. In all cases the owner of nonresident lands which have been sold for nonpayment of taxes has at least six years after the assessment to attack the proceedings on account of irregularities. The account for unpaid taxes must be certified to the Comptroller by the county treasurer before the 1st of April, after it has been returned as uncollected. (Appendix, p. 34, § 4.) The Comptroller proceeds to sell after the expiration of two years. (Appendix, p. 42, § 33.) After payment by the purchaser a certificate is issued. (P. 47, § 46.) The owner has two years to

redeem. (P. 47, § 50.) If not redeemed in two years a deed is given to the purchaser. (P. 51, § 63.) By chapter 448, Laws of 1885, as to certificates that had then been outstanding two years after the last day allowed by law to redeem and deeds that had been recorded for two years, the time was extended ~~two years.~~ six months. As to other sales the term is fixed at four years after the certificate is issued and two years after the conveyance is recorded. It would appear that the time allowed to individuals desiring to avail themselves of technical irregularities was sufficient. As Ruger, J., said in 117 N. Y., p. 240: "It would seem that the right of a property owner to assert his title to property claimed by him, after such ample opportunities to protect such right had been afforded, could be regulated by a law of limitation without incurring the objection that his property had been taken without due process of law."

This is especially true when we remember that the State has afforded the property owner and all persons interested in the land abundant opportunity to test the title of the State to any land purchased for it at a tax sale. (See Point III.)

"With reference to the six months' provision, it operates, as to all existing cases, as a limitation upon the taxpayer's right to assert his claim under pre-existing laws, and, as to all future cases, provides that the lapse of two years from recording shall make that which was before presumptive evidence only, conclusive upon the rights of the parties. The act seems to be, in its principal aspect, one of limitation, and, as such, is within the constitutional power of the Legislature to enact as affecting future

cases, and, we think, within settled rules, equally within its power as to existing rights. It gives, in all cases, a time for the person aggrieved to establish his rights unaffected by the provisions of the enactment; but provides that after the lapse of a certain time the Comptroller's deed shall be conclusive evidence of the regularity of the proceedings upon which it is based. Legislation of such a character has frequently been held within the constitutional power of the Legislature to enact."

People v. Turner, 117 N. Y. 232-3.

The authority of the Legislature of the several States to pass laws limiting or changing the time within which actions may be commenced has been frequently announced as to need no discussion.

Hart v. Lampshire, 3 Peters, 280.
Hawkins v. Barney, 5 Peters, 457.
Sohn v. Watterson, 17 Wall. 596.
Terry v. Anderson, 95 U. S. 628.
Koshkonog v. Burton, 104 U. S. 668.
Sanger v. Nightingale, 122 U. S. 184.
Rexford v. Knight, 11 N. Y. 308.
Hand v. Ballou, 12 N. Y. 541.
Howard v. Moot, 64 N. Y. 262.

III.

Applying the foregoing propositions to the case of the plaintiff in error, it appears that neither he nor his grantors have been deprived of property without due process of law.

A. If it be the law that it was requisite for the assessors to make oath after the third Tuesday in August, and if it be the fact that such oath was not so taken in 1867, but was taken upon August 10th, it is confidently

urged that such omission was not jurisdictional, but a mere irregularity; the alleged defect was cured by chapter 448, Laws of 1885, and any action based upon this should have been commenced within six months after the law went into effect.

B. Parties owning or interested in the property were deprived of no constitutional or substantial right by reason of the failure of the assessors to meet or take oath on the third Tuesday of August, 1870. Chapter 176, Laws of 1851, § 5, contemplated this very contingency, and provided that, "any person aggrieved by the assess-"ment of the assessors may appeal to the board of super-"visors, at their next meeting, who shall have power to "correct and review such assessment." And if the owner desired to bring suit he should have done so within six months after the statute took effect.

C. The owners and parties in interest had until the expiration of six months after June 5, 1885, to bring any action they desired, to vacate the tax, or any sale, conveyance or certificate made thereunder, or to regain possession of the land. (Laws 1885, chap. 448, § 2.)

The owner was authorized to bring a direct action against the Comptroller to vacate the tax sale or conveyance or certificate of sale made thereunder. (Laws 1885, chap. 448.) If it be conceded that the owner could not apply to the Comptroller for cancellation, he could nevertheless proceed against him by action. If the Comptroller could not be made a *judge to try conflicting titles on application by the owner, he could be made a party in an action brought by the owner.*

The distinction is plain. The form of proceeding would

be different; the relief and result would be the same. Where the State is the purchaser it would be absurd to argue that if the owner is not permitted to apply to the Comptroller for cancellation, but must pursue another method to secure the same relief, he is, therefore, deprived of a constitutional right, and still more absurd to claim that the State would not be bound by an action brought against the Comptroller to the same extent as by an application for cancellation made to the Comptroller. Not only applications, but actions, are referred to in the statute, and it is plain that the word "action" is not used in any narrow or technical sense.

D. The Forest Commissioners could have been made defendants.

Section 11, chapter 283, Laws of 1885, provided: "The Forest Commission may bring in the name or on behalf of the People of the State of New York any action to prevent injury to the Forest Preserve * * * which any owner of lands would be entitled to bring. * * * With the consent of the Attorney General and the Comptroller, the Forest Commission may appoint attorneys and counsel *to prosecute any such action or to defend any action brought against the commission or any of its members or subordinates arising out of their or his official conduct with relation to the Forest Preserve.*"

The court held in People v. Turner, 145 N. Y. 461, that the State held through the Forest Commission the actual possession of the lands in question.

About the correctness of this proposition there is no room for question. The Court of Appeals again held this explicitly in 151 N. Y. 540, in the case of People ex rel. Millard v. James A. Roberts, Comptroller. In

that case O'Brien, J., says: "If the sale is invalid, his title (the owner's) is not affected, and he may keep and defend his possession, or if put out of possession, *regain it by action of ejectment.*" In this case the land had been bid in for the State at a tax sale and duly deeded to the State by Comptroller's conveyance.

Still more recently, the Court of Appeals, in the case of People ex rel. The Forest Commission v. Campbell, 152 N. Y. 51, speaking of the title of the plaintiff in error to the very land in question, has held that the possession of that commission is the possession of the State and they may sue or be sued accordingly They may defend their possession of the lands in the Forest Preserve.

The court says: "The act (instituting the Forest Commission) *clearly contemplates not only actions brought by the commission in the name of the State, but actions against the commission or any of its members or subordinates arising out of their official action.*"

The case referred to in 152 N. Y. reaffirms the doctrine laid down in 145 N Y. The court says: "The case of People v. Turner, referred to in the opening of this opinion, was affirmed in this court (145 N. Y. 451), and it was then held that the State was placed in constructive possession of the lands in question, through the Comptroller's purchase and deed, but that subsequently *it was in actual possession* by reason of the creation of the Forest Commission and the powers and duties devolved upon it by the act of 1885. *The possession of the commission is the possession of the State.*"

Here then we have three distinct declarations by the Court of Appeals of the State of New York that the

Forest Commission, by virtue of chapter 283 of the Laws of 1885, was placed in the actual possession of the Forest Preserve, empowered not only to bring but to defend actions and the further holding that their possession is the possession of the State. In two of these cases the land in controversy in this case was under consideration.

Chapter 283 went into effect May 15, 1885 and the validating act (chap. 448) went into effect June 9, 1885. We quote from 152 N. Y. 57. "It is necessary to determine "the precise powers conferred upon the Forest Commis- "sion by chapter 283 of the Laws of 1885. The first sec- "tion of the act creates the commission; the seventh "section defines what lands shall be known as the Forest "Preserve, and the ninth section declares 'the Forest "Commission shall have the care, custody, control and "superintendence of the Forest Preserve.' The subse- "quent provisions of the act confer numerous and detailed "powers upon the commission, but those bearing upon "this case are to be found in section 11, which provides, "among other things, as follows: 'The Forest Commis- "sion may bring in the name, or on behalf, of the People "of the State of New York any action to prevent injury "to the Forest Preserve or trespass thereon; to recover "damages for such injury or trespass; to recover lands "properly forming part of the Forest Preserve, but occu- "pied or held by persons not entitled thereto, and in all "other respects for the protection and maintenance of "the Forest Preserve, which any owner of lands would be "entitled to bring.' The section proceeds to confer upon "the commission detailed powers in bringing actions for "trespass, and then closes as follows: 'With the consent "of the Attorney-General and the Comptroller, the Forest

"Commission may employ attorneys and counsel to prose-
"cute any such action, or to defend any action brought
"against the commission, or any of its members or subordi-
"nates arising out of their or his official conduct with rela-
"tion to the Forest Preserve. Any attorney or counsel so
"employed shall act under the direction of and in the
"name of the Attorney-General. Where such attorney
"or counsel is not so employed, the Attorney-General
"shall prosecute and defend such actions.'

"It will thus be observed that the commission is given
"the absolute care, custody, control and superintendence
"of the Forest Preserve, and are authorized for its protec
"tion and maintenance to bring any and all actions and
"proceedings which an owner of land would be entitled
"to institute. The commission may retain counsel with
"the consent of the Attorney-General and Comptroller,
"and, if this is not done, it is made the duty of the
"Attorney-General to act in their behalf. The act
"clearly contemplates not only actions brought by the
"commission in the name of the State, but actions against
"the commission, or any of its members or subordinates
"arising out of their official action.

"It is difficult, when we consider these sweeping pro-
"visions, to believe that it was not the intention of the
"Legislature to clothe the commission with the amplest
"and most complete powers to represent the State in the
"Forest Preserve.

* * * * * * *

"The case of People v. Turner, referred to in the open-
"ing of this opinion, was affirmed by this court (145 N.
"Y. 451), and it was there held that the State was placed

"in constructive possession of the lands in question "through the Comptroller's purchase and deed, but that "subsequently it was in actual possession by reason of "the creation of the Forest Commission, and the powers "and duties devolved upon it by the act of 1885. The "possession of the commission is the possession of the "State."*

There was no obstacle in the way to prevent the alleged owner of this property from commencing suit against the Forest Commission at once to test the title of the State to the lands in question, and to determine the regularity of all proceedings.

E. Again, it was provided by section 4 of chapter 453, Laws of 1885: that "from and after an advertisement "once a week for three successive weeks of a list of wild, "vacant or forest lands, to which the State holds title "from a tax sale or otherwise, in one or more newspapers "to be selected by the Comptroller, published in the "county in which said lands may be located, all of such "wild, vacant or forest lands shall be deemed and are "hereby declared to be in the actual possession of the Comp-"troller of this State, and such possession shall be deemed "to continue until he has been dispossessed by the judg-"ment of a competent tribunal."

There is no evidence here that the plaintiff or any of its grantors ever sought, during the six months elapsing after the passage of chapter 448, Laws of 1885, which became a law on the same day as chapter 453 (June 9, 1885), to have the Comptroller take the actual possession of these lands. There can be no doubt but that if the Comptroller failed to so advertise he could have been

* The Comptroller's deed vests in the grantee an absolute Estate in Fee Simple. Appendix P. 51. Rec. 63. Ejectment will lie against a person claiming title through adverse occupation

compelled to do it by *mandamus*, and there can be little dispute as to the purposes of this act, which was passed upon the same day as the curative and limitation statute aforesaid. It was to add facilities to those already existing under section 11, chapter 283, Laws of 1885, for an aggrieved owner to recover lands to which the State maintained a claim of title and ownership.

"Where power is given to public officers in permissive "language, 'as that they *may*, if deemed advisable,' do a "certain thing, 'whenever the public interest or indi- "vidual rights call for its exercise,' the language used, "though permissive in form, is in fact peremptory. "What they are empowered to do for a third person, the "law requires shall be done. The power is given, not "for their benefit, but for his. It is placed with the "depositary to meet the demands of right and to prevent "a failure of justice. It is given as a remedy to those "entitled to invoke its aid, and who would otherwise be "remediless. In all such cases, it is held that the intent "of the Legislature, which is the test, was not to devolve "a mere discretion, but to impose a positive and absolute "duty."

Supervisors v. U. S., 4 Wall. 435, 446 7, and New York cases cited.
City of Galena v. Amy, 5 Wall. 705, 708-9.
Mayor, etc., of New York City v. Furge, 3 Hill, 612.
Mason v. Fearson, 9 How. (U. S.) 237, and cases cited.
People v. State Ins. Co., 19 Mich. 392.
East Boston Ferry Co. v. Mayor, etc., 101 Mass. 488.

F. The owners and parties interested could have commenced suit at once to remove a cloud from the title

The statute provides that all conveyances that had been recorded for two years and all outstanding certificates that had remained in force for two years after the last day allowed by law to redeem, should, six months after the law took effect, be conclusive evidence of regularity, and that all other conveyances should be conclusive evidence of regularity after the expiration of two years from the date of recording, and all other certificates conclusive evidence four years from and after the date of issuing such certificates. The owner or occupant is allowed two years after the date of sale to redeem. (Appendix, p. 47, § 50.) As to all cases where the certificate had been issued for four years or the conveyance recorded for two years at the time the law went into effect an action could have been commenced at once to vacate the certificate or deed, as a cloud upon the title. As to all other cases where it appeared that the Comptroller intended to execute a conveyance, an equitable action could be maintained to prevent a cloud upon the title. The Comptroller's intention would be indicated by his advertising for redemption.

Sanders v. Village of Yonkers, 63 N. Y. 489.

Clark v. Davenport, as Comp., 95 N. Y. 477. (In this case the State was the purchaser.)

Hagner v. Hall, 10 App. Div. 581.

Sanders v. Downs, 141 N. Y. 424.

The lawfulness of the possession of the Comptroller or the Forest Commission, and the right and title of the State to the property may, by a court of competent jurisdiction, be the subject-matter of inquiry, and adjudged accordingly.

United States v. Lee, 106 U. S. 196.

As has been hereinbefore demonstrated, the State, by the acts of its Legislature, as construed by its courts, has submitted its title to lands purchased for nonpayment of taxes to the jurisdiction of a judicial tribunal, and has pointed out the way in which such title can be tested.

In the recent case of The Saranac Land and Timber Company v. James A. Roberts, as Comptroller, 68 Fed. Rep. 521, the court, speaking of the possession of the Comptroller, says:

"But suppose the court proceeds a step further, and assumes that the defendant is sued and will justify under chapter 711 of the Laws of 1893. Section 13 of that act provides: 'The Comptroller may advertise once a week for at least three weeks successively, a list of the wild, vacant and forest lands to which the State holds title, from a tax sale or otherwise, in one or more newspapers to be selected by him, published in the county in which the lands are situated, and from and after the expiration of such time all such wild, vacant or forest lands are hereby declared to be and shall be deemed to be in the actual possession of the Comptroller, and such possession shall be deemed to continue until he has been dispossessed by a court of competent jurisdiction.'"

"This section must be considered in its entirety. The "last clause can not be ignored. It would seem clear that "it was the intention of the Legislature to submit the "question of the Comptroller's title to the decision of a "court having jurisdiction. It was conceded at the argu- "ment that the theory of the demurrer made the clause "in question inoperative, and would enable the defendant "to seize and hold the property of others without being

"amenable to the process of any court. There is no "occasion for so drastic a construction. In placing the "Comptroller in possession of the forest lands the Legis- "lature recognized the probability of controversies over "his title, and pointed out the manner in which such dis- "putes should be decided. The plaintiff is pursuing the "remedy of the statute. It is a suit sanctioned by the "State. (Regan v. Trust Company, 154 U. S. 362, 392.)'"

It must be assumed that all the courts of the State would give full force and effect to these provisions.

"When the inquiry is whether a State enactment under "which property is proposed to be taken for a public "purpose accords full opportunity to the owner, at some "stage of the proceedings involving his property, to be "heard as to their regularity or validity, we must assume "that the inferior courts and tribunals of the State will "give effect to such enactment as interpreted by this "highest court of that State."

Lent v. Tillson, 140 U. S. 328.

How, then, was the owner deprived of any rights or remedies? He could have appeared before the board of supervisors. He could have redeemed. He could have sued the Forest Commission. He could have taken action against the Comptroller. He could have brought suit to cancel the tax sale and conveyance. He could have brought an action of ejectment. He could have sued to remove a cloud from his title.

The best that can be said of the grantors of the plaintiff in error is that they have slept on their rights, if any they have had; they have neglected their remedy, and having had the opportunity to have their grievances

remedied, and waited until the bar of the statute has fallen, and having stood by and seen the State maintain these lands, and incur the burdens thereof, it seems the plaintiff in error can urge no just complaint against the operation of the law which makes secure the title of the State, a purchaser at the tax sale.

At the time of the pretended sale to the plaintiff in error, neither the owner nor his representatives had any remaining interest in the land. The time for them to take action had expired.

The statutes of the State relating to cancellation by the Comptroller of tax sales were enacted for the benefit of the purchaser. If the sale is invalid, the plainest principles of justice would require that the sale should be canceled by the Comptroller and the money refunded to the purchaser. The owner must pursue another remedy.

People ex rel. Wright v. Chapin, 104 N. Y. 369.
People ex rel. Ostrander v. Chapin, 105 N. Y. 309.
Ostrander v. Darling, 127 N. Y. 70.
People ex rel. Hamilton Park v. Wemple, 139 N. Y. 240.
People ex rel. Witte v. Roberts, 144 N. Y. 234.
People ex rel. Forest Commission v. Campbell, 152 N. Y. 51.

Although it has been suggested by the Court of Appeals that the owner might apply for cancellation, upon more mature consideration it has been determined by that court that the owner should commence a direct action where the conflicting claims of all parties interested can be determined by judicial decree.

The owner has, however, ample protection. He can

pay his taxes at the time and in the manner required by law; he can make complaint to the assessors upon grievance day; he is permitted to appear before the supervisors; he is allowed to redeem; if an action is commenced to evict him, he may set forth invalidity of the sale; he is authorized to commence suit by way of ejectment against the Forest Commission or Comptroller; he can sue the Comptroller to vacate the sale and conveyance; he is deprived of no substantial right. But if his action is based upon irregularities he must bring his action within four years after the certificate is issued and two years after the conveyance is recorded.

By the decisions in People v. Turner, 117 N. Y. 227, and People v. Turner, 145 id., and other cases, holding that chapter 448, Laws of 1885, considered as an act of limitation, afforded the landowner a reasonable opportunity to enforce his rights, the Court of Appeals of New York has established a rule of property in the State of New York which is binding on the United States courts. After such a settled course of decisions upon the act of limitation under consideration, a contrary decision by this court would present a conflict between the State courts and those of the United States productive of incalculable mischief. Many conveyances of land have been made and large sums of money paid therefor and purchasers have entered into possession and made extensive valuable improvements thereon upon the strength of these decisions. A contrary decision by the United States Supreme Court would resurrect thousands of dead claims. The United States courts will adopt the State decisions because they settle the law applicable to

the case, and the reasons assigned for this course apply as well to rules of construction growing out of the common law, as the statute law of the State, when applied to the title of lands.

Geekie v. Kirby Carpenter Co., 106 U. S. 385.
Jackson v. Chew, 12 Wheat. 166, 167.
Barret v. Holmes, 102 U. S. 655.
Beauregard v. New Orleans, 18 How. 502.
Suydam v. Williamson, 24 How. 427.
Nichols v. Levy, 5 Wall. 433.
Williams v. Kirtland, 13 Wall. 306.
Sanger v. Nightingale, 122 U. S. 184.
Green v. Neal, 6 Peters, 291.
Harpending v. Dutch Church, 16 Peters, 455.
Porterfield v. Clark, 2 How. 76.
Elmendorf v. Taylor, 10 Wheat. 152.
Bk. of Hamilton v. Dudley, 2 Peters, 492.
U. S. v. Morrison, 4 Peters, 124.
Gaines v. Dunn, 14 Peters, 322.
Bailey v. Magwire, 22 Wall. 215.

CASES CITED BY COUNSEL FOR PLAINTIFF IN ERROR.

In none of the cases cited by the learned counsel for the plaintiff in error was the effect of a statute of limitations or curative statute considered in connection with the defect here complained of. The distinction between "jurisdictional," as used in a direct action *without* the intervention of a statute of limitations or curative statute and as used in connection with such a statute, is clearly pointed out in Ensign v. Barse, 107 N. Y. 346, where the court says:

"The opinion in the present case is careful not to deny "a possible fatal result of the defect, although it is rather

" formal than substantial, but for the curative effect of " the statute of 1882, which had no parallel in any form " in the facts of the cited case. In the opinion then " delivered, the defect was not deemed jurisdictional in " any other sense than the modified one of an essential " condition under the law as it stood. Whether it was " so jurisdictional as that the Legislature could not have " dispensed with it, and, therefore, could not cure its " omission, is a very different inquiry. A defect may be " in one sense jurisdictional relatively to the authority of " the assessors acting under any existing law, and yet not " so as it respects the power of the Legislature to pass a " statute curing the defect; and it is only by confusing " these two things, which the opinion separated, that a " seeming contradiction can be reached."

The learned counsel for the plaintiff in error refuses to accept the construction of the New York statutes which has been given them by the courts of that State.

1. He cites a large number of cases in which defects, although irregularities, might be loosely termed jurisdictional, in the absence of a curative statute limiting the time within which such irregularities could be urged. (Brief for plaintiff in error, pp. 14 to 21.)

In the case of Westfall v. Preston et al., 49 N. Y. 349 (decided in 1872), suit was brought by the owner of premises irregularly assessed, against the assessors and other officers, and none of the questions under consideration here were involved in that case.

In the case of Jewell v. Van Steinberg (1874), 58 N. Y. 85, no notice was given to the property owners, as required by statute, although it was held in that case that if the

party whose property is assessed appears and is heard, or has an opportunity to be heard, in reference to the assessment, that that would be a waiver of notice, and that the property owner would be concluded thereby.

In the case of Bradley v. Ward (1874), 58 N. Y. 401, the court held : The defects complained of were irregularities as between the parties.

It will be found by examination of all the other cases cited by the counsel, among others, Smith v. Mosher, 31 St. Rep. 235 ; People v. Hagadorn, 104 N. Y. 516 ; Shattuck v. Bascom, 105 id. 39 ; Johnson v. Ellwood, 53 id. 431 ; Thompson v. Burhans, 61 id. 52, that the question as to whether the defects complained of were irregularities within the meaning of the curative act of 1885, or jurisdictional in their nature, was not considered.

The Court of Appeals has held, in the case now under review, that under the statutes of the State of New York the neglect to verify the assessment-roll upon the third Tuesday in August, or of the assessors to meet upon that day, was not such a jurisdictional omission as would relieve the property owner from commencing the proper action within the time limited and specified by the curative act of 1885.

2. The counsel for plaintiff in error (pp. 21 to 28) argues that the Legislature can not convert a deed which is void and a nullity by reason of jurisdictional defects into a valid conveyance. This is a self-evident proposition The Legislature of New York has not attempted to do so. The courts of that State have held that it could not do so. It has simply provided that actions based upon defects which are irregularities and not juris-

dictional must be commenced within a certain period of time. In Cromwell v. MacLean, 123 N. Y. 474, the court (Peckham, J.) clearly defines the distinction between the cases of People v. Turner and Ensign v. Barse, and the case here considered, as well as between the two statutes. This (Cromwell v. MacLean) was a case where nonresident lands were assessed to the estate of a certain person which would clearly be a failure of assessment. The court says (pp. 489–490):

"Nor is the legislation in question an exercise of the "power to provide rules of evidence and thus to give a "certain effect to a deed or lease as presumptive evi- "dence of the validity of proceedings before its execu- "tion. (People v. Turner, 117 N. Y. 227.) Nor does it "attempt to set up a statute of limitations providing "that after the expiration of a certain time it should be "conclusively presumed that all proceedings were regu- "lar. (People v. Turner, *supra*; Ensign v. Barse, 107 "N. Y. 329.) It is none of these, but a plain, naked "transfer of title by legislation. Any statute which "should make a tax deed or lease immediately upon its "execution conclusive evidence of a complete and perfect "title and thus preclude the owner of the original title "from showing its invalidity, would probably be void, "because it would, in substance, be an unconstitutional "transfer or a confiscation of property, instead of a mere "law regulating evidence. I do not refer to cases "arising under statutes of limitation, where the owner "has some appointed time in which to assert his rights, "nor to cases resting on principles of equitable estoppel. "(Cooley on Taxation [2d ed.], 297 *et seq.*)"

The courts of New York have repeatedly held that the curative act of 1885 only applies to irregularities, and as far as this particular case is concerned, have held that the omission of the assessors to meet or take their oath upon the third Tuesday of August was an irregularity and not a jurisdictional defect.

The case cited in 2 Allen, 361 (129 Mass. 559), simply holds that there does not exist in the Legislature a power to cure defects in the proceedings of courts if they have acted without jurisdiction.

The case cited in 129 Mass. 559 refers to a statute entirely different in its terms and provisions from the New York law, and providing that certain tax sales theretofore had should not be invalid unless proceedings had been instituted to test the validity of such sales, and containing various other provisions, which, while it permitted certain owners to test the validity of tax sales, debarred certain other owners from commencing any action whatever.

The case cited in 23 Wis. 102, repeats the familiar proposition that the Legislature can not make a void deed valid.

In the case cited in 97 U. S. 687, Congress passed an act ratifying and validating certain assessments in the District of Columbia. The court says, at page 690, "Congress may legislate within the district, respecting the people and property therein, as may the Legislature of any State over any of its subordinate municipalities. It may, therefore, cure irregularities and confirm proceedings which without the confirmation would be void, because unauthorized, provided such confirmation does not interfere with intervening rights."

The learned counsel concedes the right of the Legislature to enact curative acts relating to tax titles. At page 25 he says: "The defects in the tax proceedings "shown in the present case anterior to the sale — the "improper verification of the roll, and the failure of the "assessors to meet to review their assessments — might "no doubt have been cured as regards the tax itself, "giving, of course, the opportunity to the landowner to "pay the tax when validated, and in default of payment "the land might then have been sold."

The Legislature, however, has been much more liberal than the learned counsel desires, and has given the parties interested in the land ample time and opportunity to commence any action which they may desire to test the regularity of any of the proceedings; providing, however, that such actions shall be commenced within a prescribed limit; but imposing no limit as to void proceedings. If the tax sale or conveyance is set aside, the owner is not required to pay taxes irregularly levied, though doubtless the taxing officers might reassess the land.

3. The remainder of the counsel's brief is an argument, in the main, that the owners and persons interested in the property did not have any opportunity to try their rights in the courts; that there was no officer of the State in actual possession; that the State would not be bound by the judgment. As we have already demonstrated in our brief, the courts of the State of New York have held the direct converse of all these declarations of the learned counsel.

145 N. Y. 461.
151 N. Y. 540.
152 N. Y. 51.
95 N. Y. 477.
68 Fed. Rep. 521.

In the case of The Saranac Land and Timber Company v. James A. Roberts, as Comptroller, etc., 68 Fed. Rep. 521, an action of ejectment was brought against Mr. Roberts, as Comptroller of the State of New York, to test the title of the State of New York in certain lands located in the same township as the lands involved in the present suit. The Comptroller demurred to the complaint. The action having been brought under section 13 of chapter 711 of the Laws of 1893, which is similar in its terms to the provisions of section 4, chapter 452 of the Laws of 1885, to which we have heretofore referred, authorizing the Comptroller to advertise once a week for at least three weeks, lands to which the State holds title, and provided at the expiration of that time that said lands should be deemed to be in the actual possession of the Comptroller. The demurrer was overruled, and the case has been tried in the United States Circuit Court of the Northern District of New York, and is in the hands of the court for decision.

The learned counsel for the plaintiff in error in this case is also the counsel for the plaintiff in the action tried in the Circuit Court.

The counsel in his brief, submitted in The Saranac Land and Timber Company case, has insisted that the judgment of the court in that case would be binding upon the State of New York, which holds title to the land in dispute in said case.

In his brief submitted in the case he says: "It would "seem, therefore, that the Legislature had in mind the "necessity of ousting the true owner in order to con- "vert his estate in possession into a right of action, to the

"end that the limitation which they were establishing "might run against it. They provided expressly for "putting the State, through the Comptroller, in posses "sion. Had this notice been published at the time the "tax deed was executed, the former owner, Norton, "would have been disseized and an appropriate case "would have existed for the operation of a limitation "law. This was, we think, the purpose and intent of the "Legislature. It failed of accomplishment through the "inaction of the Comptroller. It is, we think, plain law "that neither the execution nor the recording of a void "tax deed operates of itself to divest the true owner of "the constructive possession of vacant lands."

The counsel repeats this language at page 74 of present brief.

The Mr. Norton referred to as a former owner in the Saranac Land and Timber Company case, is the same Norton referred to in this case now before the Supreme Court of the United States. By a peculiar course of reasoning, the counsel attempts to demonstrate that the title of the State can be tested in an action against the Comptroller in possession in the Saranac Land and Timber Company case; but can not be tested in an action against the Forest Commissioners, whom the Court of Appeals have repeatedly declared are in actual possession of the land in controversy, by virtue of the statute establishing that commission, or against the Comptroller by virtue of an action expressly authorized by chapter 448 of the Laws of 1885.

Notwithstanding the fact that the highest court of the State of New York, in construing its own statutes, has

declared that the title of the State can be tested in a direct action and that the Forest Commission and the State have been placed in actual possession of the land in controversy by virtue of the law establishing that commission, to wit: Chapter 283, Laws of 1885, and the tax laws of the State, the learned counsel insists that said courts either have no right to construe, or else are in error in construing the meaning of the statutes of their own State.

IV.

The judgment of the courts of New York should be affirmed, and the writ of error dismissed.

T. E. HANCOCK,
Counsel for the State of New York, Albany, N. Y.

IN THE

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERM, 1897.

No. 41.

BENTON TURNER, PLAINTIFF IN ERROR,

against

THE PEOPLE OF THE STATE OF NEW YORK,
DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

T. E. HANCOCK,
Attorney-General, State of New York,
Counsel for Defendant in Error,
Capitol, Albany, N. Y.

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UNITED STATES SUPREME COURT.

BENTON TURNER, PLAINTIFF IN ERROR, *agst.* THE PEOPLE OF THE STATE OF NEW YORK, DEFENDANT IN ERROR.	No. 41.

Brief of Defendant in Error in opposition to application of Plaintiff in Error for reargument or modification of the judgment of affirmance in above entitled case, rendered by the Supreme Court of the United States.

I.

There are no equities or merits in the case of the Plaintiff in Error.

The land described in the pleadings was sold by the Comptroller of the State of New York October 12, 1877, for unpaid taxes of the years 1866 to 1870, inclusive, and

the premises were purchased in behalf of the State. The two years allowed for redemption expired October 12, 1879; the premises were deeded to the State June 9, 1881, and the deed was recorded June 8, 1882. The title of the State to this property, by virtue of the tax sale, was never questioned by the owners or any other person in interest; but it appears that the plaintiff in error, presumptively and no doubt actually, with full knowledge of all the facts, secured a conveyance of these premises from one Riley, December 27, 1886, over nine years after the conveyance to the People of the State of New York, and has undertaken to assert title to the land as against the State, by reason of two technical irregularities which were really trivial in their nature, in no way prejudicing the rights of the original owners; one of the irregularities being that the assessors, in preparing the assessment-roll for the year 1867, took their oath as to the correctness of the roll upon the 10th day of August, instead of on the third Tuesday of August; the second irregularity charged being that in the year 1870 the assessors did not meet on the third Tuesday of August for the purpose of reviewing their assessment.

As was pointed out upon the argument, section 5 of chapter 176, Laws of 1851, made ample provision for this very contingency, providing that, in case of the neglect of the assessors to meet for review upon the third Tuesday of August, "any person aggrieved by the assessment of the assessors may appeal to the board of supervisors at their next meeting, who shall have power to review and correct such assessments."

II.

The statute which Mr. Turner is attempting to have declared unconstitutional and void (Chapter 448, Laws 1885) became a law June 9, 1885, and its validity has never been questioned by any of the courts of the State of New York.

It is respectfully urged that the plaintiff in error ought not to be permitted to any further assail the constitutionality and binding force of a statute confirmed by a uniform line of decisions, relying upon which numerous conveyances of land have been made, large sums of money have been paid and a rule of property has been established.

III.

While it is true that the Court of Appeals, upon mature consideration, has come to the conclusion that the owner should not be permitted to apply to the Comptroller for cancellation, and thereby make him a court to test and decide the respective claims of title that might be advanced by the purchaser and the owner, the learned counsel for Mr. Turner is entirely in error in claiming or suggesting that the property owner has not always had ample opportunity to test the regularity of assessments and tax sales, providing action was commenced therefor within the reasonable time provided by statute.

It was suggested by the Court of Appeals in this case (145 N. Y. 457; 117 id. 227) that the owner might apply

to the Comptroller for cancellation; but the court thereafter specifically declared that this statement was a mere inadvertence and was not at all necessary to the decision of the case.

139 N. Y. 247, 248.
151 N. Y. 540.

It would appear that the language of the statute is plain enough and clearly points out that *an action could be brought against the Comptroller* to vacate the tax sale or conveyance or certificate of sale. The learned counsel persists in his contention that, because the Comptroller could not be made a judge to try conflicting titles upon an application by an owner, he could not be made a party in an action brought by the owner. *Non sequitur.* The statute says (Chap. 448, § 2): "The provisions of this act * * * shall not affect any action, proceeding or application pending at the time of its passage; *nor any action that shall be begun* * * * for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder."

It is perfectly plain, from the language of the statute, that it contemplates that an action could be commenced against the Comptroller, not of ejectment, but for the purpose of vacating tax sales, conveyances and certificates, if brought within the time provided by statute. We have here the owner of the lands, the Comptroller, and a statute expressly authorizing an action to be commenced for the purpose of vacating the sale, if brought within the time prescribed by statute; and we have also Mr. Benton Turner, who acquired title to this land many years after it was bought by the State, complaining that the owner was deprived of his day in court.

Moreover, the case of Clark v. Davenport, 95 N. Y. 477, recognizes the right of an owner to commence an action against the Comptroller to set aside a deed as a cloud upon title, if the action is brought at the proper time, based upon the proper facts authorizing actions of this character to be commenced.

IV.

The plaintiff in error complains that he or his grantor, or some other person, has been deprived of rights and remedies which none of them ever attempted to assert. The learned counsel is not correct in stating that any new rule was laid down in People v. Roberts, 151 N. Y. 540, or People ex rel. Forest Commission v. Campbell, 152 N. Y. 51.

In the case of People v. Turner, 145 N. Y., the court says, at page 456: "The lands in question are within "what is known as the 'Forest Preserve of the State of "New York,' and the second section of the act of 1885 "makes its provisions applicable to those counties which "include the Forest Preserve. The six months men- "tioned in the act, within which tax sales and proceed- "ings might be open to question after the act went into "effect, expired December 9, 1885. The Forest Commis- "sion had been established in May, 1885, and, by the act "creating that commission, it was given the care, custody, "control and superintendence of the Forest Preserve. A "warden was employed by the Forest Commission, who "discovered the cutting of the timber by the defendant, "and this action was then brought, in behalf of the People, "by the Forest Commission."

And, again, at page 461: "While we think the People "were not bound to take any steps toward actual posses- "sion, after the conveyance to them of the land, any doubt "upon the subject would seem to be eliminated by virtue "of the provisions of the act which created the Forest "Commission and placed the Forest Preserve, within "which are the lands in question, in the care, control "and supervision of the commission. The constructive "posse-sion which the State had acquired, I think, was "made an actual possession by the powers and duties "devolved upon the Forest Commission as its representa- "tive."

And this doctrine is reiterated by the court in the cases above referred to in 151 N. Y. and 152 N. Y.

V.

The counsel persists in going outside of the record to sustain his contention that the Forest Commission did not come into existence until September, 1885.

The act appointing the Forest Commission went into effect May 15, 1885. The counsel states in his supplemental brief filed upon the argument of the case (page 13) that upon this same day, to-wit, May 15, 1885, three Forest Commissioners were nominated by the Governor, and duly confirmed, and there is no pretense that at least one of them, Theodore E. Basselin, did not at once take and file his oath of office, and there is no presumption that the other two did not take and file the necessary oath. We think it extremely absurd for

the counsel to argue, in face of the decisions of the Court of Appeals of the State of New York, that there was not a Forest Commission in existence. In the case of People v. Turner, 145 N. Y. 456, the court says: "The Forest Commission had been established in May, "1885." In the case of People ex rel. Forest Commission v. Campbell, 152 N. Y. 58, the court says: "The "case of People v. Turner, referred to in the opening of "this opinion, was affirmed in this court (145 N. Y. 451), "and it was there held that the State was placed in con- "structive possession of the lands in question through "the Comptroller's purchase and deed, but that subse- "quently it was in actual possession by reason of the "creation of the Forest Commission and the powers and "duties devolved upon it by the act of 1885. The pos- "session of the commission is the possession of the "State."

How, then, can it be urged by the learned counsel, in view of these facts as well as the emphatic declarations of the Court of Appeals of the State, that the State could be permitted to allege in defense to an action against the Forest Commission that there was no Forest Commission in existence? Furthermore, chapter 448, Laws of 1885, has been construed as a statute of limitations, and if we were to concede everything alleged, either as a matter of fact or a matter of law, by the learned counsel for the plaintiff in error, according to well-established principles, the omission to appoint a Forest Commission would only operate as a suspension of the statute *pro tanto*, that is, for the period of four months. The statute would certainly begin to run when

the property owners had it in their power to make their cause of action complete, and there was a body in existence against which action could be commenced. A suspension of the statute for four months would not operate as a suspension *ad infinitum*. It is to be observed, however, that the Forest Commission is a continuous body. The statute itself (chapter 283, Laws of 1885, section 1) constitutes the *Forest Commission*. Proceedings are instituted not by or against the commissioners as individuals or as officers, but as a Forest Commission. Thus it was held in People ex rel. Forest Commission v. Campbell, 152 N. Y. 51, that "The Forest Commission has "been a continuous body since its creation under chapter "283, Laws of 1885."

It is respectfully urged that all the applications made in behalf of the plaintiff in error should be denied.

T. E. HANCOCK,

Attorney for Defendant in Error, the People of the State of New York.